UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ADRIAN SCHOOLCRAFT,

Plaintiff,

- against -

CITY OF NEW YORK, et al.,

Defendants.

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10 Civ. 6005 (RWS)

OPINION

A P P E A R A N C E S:

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Sweet, D.J.

Plaintiff Adrian Schoolcraft ("Schoolcraft," or the "Plaintiff") has filed a motion to amend his complaint to include a First Amendment claim under 42 U.S.C. § 1983, raising claims of both prior restraint and retaliation. Defendants the City of New York, the New York Police Department ("NYPD"), Deputy Chief Michael Marino, Assistant Chief Patrol Borough Brooklyn North Gerald Nelson, Captain Theodore Lauterborn, Sergeant Frederick Sawyer, Sergeant Kurt Duncan, Lieutenant Christopher Broschart and Sergeant Shantel James (collectively, the "City Defendants") oppose Plaintiff's request.[1] Based on the conclusions set forth below, Plaintiff's motion to amend is granted with respect to his claim of prior restraint, but denied with respect to his claim of retaliation.

Facts & Prior Proceedings

[1] In addition to the City Defendants, Plaintiff has also identified as defendants Deputy Inspector Steven Mauriello, Lieutenant William Gough, Lieutenant Timothy Caughey, Jamaica Hospital Medical Center, Dr. Isak Isakov, Dr. Lilian Aldana-Bernier and various John Does. These individuals, together with the City Defendants, are collectively referred to as the "Defendants."

A detailed recitation of the facts of the case is provided in this Court's opinion dated May 6, 2011, which granted in part and denied in part Defendant Jamaica Hospital Medical Center's motion to dismiss. See Schoolcraft v. City of N.Y., No. 10 Civ. 6005(RWS), 2011 WL 1758635, at *1 (S.D.N.Y. May 6, 2011). Familiarity with those facts is assumed.

On August 10, 2010, Plaintiff filed his initial complaint alleging violations of his civil rights when NYPD personnel, in order to prevent Plaintiff from disclosing the existence of an illegal summons quota policy, entered Plaintiff's home, forcibly removed him in handcuffs, seized his personal effects and had Plaintiff admitted to Jamaica Hospital Medical Center ("Jamaica Hospital") against his will under false information that Plaintiff was "emotionally disturbed." The complaint alleged that Plaintiff was subsequently held at Jamaica Hospital's psychiatric ward involuntarily for six days in an alleged effort to tarnish Plaintiff's reputation and discredit his allegations should he succeed in disclosing evidence of misconduct within the NYPD. Plaintiff filed a First Amended Complaint on September 13, 2010.

On October 12, 2010, Jamaica Hospital moved to dismiss the First Amended Complaint. After the parties agreed to several extensions of the briefing schedule, the motion was marked fully submitted on January 20, 2011. In an opinion filed May 6, 2011, Jamaica Hospital's motion to dismiss was granted in part and denied in part, as Plaintiff failed to establish Jamaica Hospital's liability under § 1983, but supplemental jurisdiction over Plaintiff's state law claims against Jamaica Hospital was deemed appropriate. See Schoolcraft, 2011 WL 1758635.

On April 25, 2012, Plaintiff wrote to the Court requesting leave to amend the complaint to add a First Amendment retaliation claim under 42 U.S.C. § 1983. The letter was treated as a motion, and, in an opinion filed June 14, 2012, Plaintiff's motion to amend the complaint to include a First Amendment retaliation claim was denied on the basis that the speech at issue was made pursuant to Plaintiff's responsibilities as a government employee. See Schoolcraft v. City of N.Y., No. 10 Civ. 6005, 2012 WL 2161596, at *8 (S.D.N.Y. June 14, 2012).

On June 20, 2012, Plaintiff submitted a letter to the Court requesting reconsideration of the portion of the June 14 opinion denying Plaintiff's motion to amend his complaint to include a First Amendment claim. Plaintiff contended that the opinion denying Plaintiff's motion to amend overlooked Plaintiff's allegations that, after the October 31, 2009 incident and Plaintiff's suspension from the NYPD, several members of the NYPD repeatedly made uninvited trips to Plaintiff's home in upstate New York. During these trips, uniformed officers allegedly banged on and kicked in Plaintiff's door, shouted at Plaintiff to open the door and spied on Plaintiff through the windows. Plaintiff contended that these alleged acts occurred after he was suspended from the NYPD, so that any prospective speech following the October 31, 2009 incident would not have been pursuant to Plaintiff's duties as an NYPD officer. Plaintiff's letter requesting reconsideration was treated as a motion, and, in an opinion filed July 20, 2012, the motion was denied on the basis that Plaintiff, in his briefing regarding the motion to amend, never raised the issue of protected speech made after his suspension on October 31, 2009, nor did Plaintiff raise the argument that he had no duty to report misconduct following his suspension. Accordingly, Plaintiff could not identify any

arguments or controlling law the Court overlooked in deciding Plaintiff's initial motion to amend. See Schoolcraft v. City of N.Y., No. 10 Civ. 6005, 2012 WL 2958176, at *5 (S.D.N.Y. July 20, 2012).

On August 1, 2012, Plaintiff wrote to the Court requesting leave to amend his complaint to add a First Amendment claim under 42 U.S.C. § 1983 relating to the prior restraint imposed on Plaintiff's speech following Plaintiff's suspension on October 31, 2009 and the actions taken against Plaintiff in retaliation for Plaintiff's speech in refusing to comply with the allegedly illegal and unconstitutional orders of his supervisors. The August 1 letter was treated as a motion and marked fully submitted on August 22.

The Proposed Second Amended Complaint

The proposed Second Amended Complaint ("SAC"), in addition to alleging additional facts related to the alleged deprivation of Plaintiff's First Amendment rights, includes its claims for prior restraint and retaliation in the Second Claim for Relief. The Second Claim for Relief reads, in part:

The actions taken by the NYPD defendants on the night of October 31, 2009 violated plaintiff's First Amendment right as he was exercising protected speech when he refused to comply with his supervisors commands to issue summonses and make arrests in the absence of probable cause.

The conduct and actions of the NYPD defendants in retaliating against plaintiff, which eventually culminated in his unlawful detention and restraint in a psychiatric ward in retaliation against him for refusing to commit illegal and unconstitutional acts at the behest of his supervisors, were wrongful, oppressive and unlawfully taken in retaliation against him for exercising his Constitutional Right to Free Speech as a private citizen regarding matters of public concern.

Plaintiff's aforementioned unjustified arrest and detention was not authorized by law and were in retaliation of plaintiff's speech and aforesaid refusals to comply with illegal and unconstitutional directives.

NYPD defendants infringement upon and violation of plaintiff's rights protected by the First Amendment to the United States Constitution was intended to harm plaintiff, and to place a chilling effect upon the exercise of such rights by plaintiff and other persons as is their right, as provided by the U.S. Constitution and exercise of such rights.

Further, following plaintiff's suspension on October 31, 2009 the NYPD defendants unconstitutionally imposed this prior restraint on plaintiff's speech in an effort by defendants to silence, intimidate, threaten and prevent plaintiff from disclosing the evidence of corruption and misconduct plaintiff had been collecting and documenting to the media and the public at large.

Specifically, NYPD defendants illegally seized plaintiff's draft report to Commissioner Raymond Kelly detailing the police corruption and misconduct he had been documenting and collecting in an effort to prevent said material from being disclosed to anyone.

Additionally, NYPD defendants also seized plaintiff's

> personal notes and other effects regarding his complaints against the 81st precinct in an effort to prevent said material from being disclosed to anyone and especially members of the news media and victims of the aforementioned corruption.
>
> Further, defendants involuntarily committed plaintiff to the psychiatric ward of Jamaica Hospital as an emotionally disturbed person and following his release made repeated trips hundreds of miles outside of their jurisdiction to his home in upstate New York in a continued effort to harass and intimidate him in order to prevent his speech from being uttered.

SAC ¶¶ 255-262.

Accordingly, Plaintiff's First Amendment prior restraint claim is based on both Defendants' alleged efforts to involuntarily confine Plaintiff to Jamaica Hospital as well as Defendants' alleged campaign of harassment following Plaintiff's suspension. Defendants' actions allegedly sought to prevent Plaintiff from disclosing to the media and public the evidence he had gathered concerning the NYPD's summons policy. Plaintiff's First Amendment retaliation claim is based on a theory that Plaintiff's refusal to issue summonses and make arrests in the absence of probable cause constituted speech. According to Plaintiff, Defendants' alleged actions on the night of October 31, 2009 and his subsequent involuntary detention constitute retaliation against Plaintiff

for his refusal to obey his supervisors' allegedly unconstitutional orders.

The Applicable Standard

Pursuant to Fed. R. Civ. P. 15(a)(2), leave to amend a complaint shall be given "freely" when "justice so requires." "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Williams v. Citigroup Inc., 659 F.3d 208, 213 (2d Cir. 2011) (quoting Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962)). However, "[a] district court has discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." McCarthy v. Dun & Bradstreet Corp., 482 F.3d 184, 200 (2d Cir. 2007); see also AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A., 626 F.3d 699, 726 (2d Cir. 2010) ("Leave to amend may be denied on grounds of futility if the proposed amendment fails to state a legally cognizable claim or fails to raise triable issues of fact.").

When denying a motion to amend based upon futility,

the denial should be calculated pursuant to the standards utilized to determine a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals, 282 F.3d 83, 88 (2d Cir. 2002) (citations omitted). When considering a motion to dismiss, "a court must accept the allegations contained in the complaint as true, and draw all reasonable inferences in favor of the non-movant." Sheppard v. Beerman, 18 F.3d 147, 150 (2d Cir. 1994). However, this "tenant . . . is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 554, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Accordingly, to defeat a motion to dismiss, a claim must include "facial plausibility . . . that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft, 556 U.S. at 678.

Plaintiff's Motion To Amend The Complaint Is Granted In Part And Denied In Part

As noted above, Plaintiff seeks to include a First

Amendment claim under 42 U.S.C. § 1983 based on (1) the prior restraint imposed on Plaintiff's speech following Plaintiff's suspension on October 31, 2009, and (2) the actions taken against Plaintiff in retaliation for Plaintiff's speech in refusing to comply with the allegedly illegal and unconstitutional orders of his supervisors. For the reasons described below, Plaintiff's motion to amend is granted with respect to his prior restraint claim, but denied with respect to his retaliation claim.

A. Plaintiff's Motion To Amend Is Granted With Respect To Allegations Of Prior Restraint Imposed On Plaintiff's Speech Following His Suspension

In addition to the passages quoted above, Plaintiff's proposed SAC includes the following allegations:

> As a result of the forgoing, the NYPD defendants, through a campaign of harassment and intimidation, forced plaintiff to move to upstate New York, approximately three hundred fifty (350) miles away from New York City.
>
> Notwithstanding this move, between December 2009 and continuing on through the present, armed NYPD officials continued their relentless efforts to silence, harass and/or otherwise harm plaintiff and his father in the form of making over a dozen appearances at his home in upstate New York.
>
> During these "visits", the NYPD has dispatched teams of

> armed detectives and other armed members of the New York City Police Department to harass and intimidate plaintiff by pounding and kicking on his door and shouting "NYPD. WE KNOW YOU'RE IN THERE, OPEN UP!!!"
>
> In one instance, on December 9, 2009, an armed NYPD Sergeant drove three hundred fifty (350) miles outside of NYPD jurisdiction - on taxpayer's money - merely to "spy" on plaintiff through his bedroom window.
>
> In response to this blatant and endless attempt to continuously harass and intimidate plaintiff, plaintiff moved his bed out of said bedroom in order to prevent imminent physical and emotional harm upon his person.
>
> Notwithstanding this action, armed NYPD officials continue, up and through the present, to come to his home, repeatedly pound on his door, photograph him, and engage in efforts designed to purposefully intimidate and harass plaintiff in a tireless effort to silence him once and for all.

SAC ¶¶ 208-13. These allegations, along with those quoted in this opinion's description of the proposed SAC, establish a prima facie claim for prior restraint. Accordingly, Plaintiff's motion to amend his complaint to include a claim of prior restraint is granted.

"It is well-established that 'First Amendment rights may be violated by the chilling effect of governmental action that falls short of a direct prohibition against speech.'" Zieper v. Metzinger, 474 F.3d 60, 65 (2d Cir. 2007) (quoting Aebisher v. Ryan, 622 F.2d 651, 655 (2d Cir. 1980)).

"Accordingly, the First Amendment prohibits government officials from encouraging the suppression of speech in a manner which 'can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request.'" Id. at 65-66 (quoting Hammerhead Enters., Inc. v. Brezenoff, 707 F.2d 33, 39 (2d Cir. 1983)). "In determining whether a particular request to suppress speech is constitutional, what matters is that 'distinction between attempts to convince and attempts to coerce." Id. at 66 (quoting Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003)). "The test is objective: whether the official's comments can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request to cease engaging in protected speech." Zieper v. Metzinger, 392 F. Supp. 2d 516, 525 (S.D.N.Y. 2005) (internal quotation marks and citations omitted).

As was noted in this Court's June 14, 2012 opinion, when a citizen enters government service, he or she "by necessity must accept certain limitations on his or her freedom." Garcetti v. Ceballos, 547 U.S. 410, 418, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006). This includes a limitation on

the protections afforded a government employee's speech. A government employee can invoke First Amendment protections for speech only when he speaks "as a citizen addressing matters of public concern." Garcetti, 547 U.S. at 417. As such, in order to invoke First Amendment protections, a government official, such as a police officer, must demonstrate not only that the subject of his speech was a matter of public concern, but also that when he spoke on the subject, he spoke "as a citizen" rather than "as a government employee." Id. at 420-22. Prior to addressing the substance of Plaintiff's proposed prior restraint claim, this question concerning whether Plaintiff was speaking pursuant to his official duties will first be addressed.

It has already been determined that speech concerning an allegedly unconstitutional summons policy employed by the NYPD is a matter of public concern. See Schoolcraft, 2012 WL 2161596, at *4. Accordingly, the only issue with respect to whether Plaintiff's speech is protected is whether Plaintiff was speaking "as a citizen" or "as a government employee." The proposed SAC's prior restraint theory is largely based on conduct that occurred following Plaintiff's suspension from the NYPD. In the proposed SAC,

Plaintiff alleges that he was suspended on the evening of October 31, 2009 after NYPD officers arrived at his home but prior to Defendants' alleged involuntarily removal of Plaintiff to Jamaica Hospital. SAC ¶ 153. Accordingly, Plaintiff's claim for prior restraint - based both on his being held involuntarily at Jamaica Hospital as an emotionally disturbed person as well as on Defendants' alleged harassment of Plaintiff at his home upstate - is based on conduct that occurred following Plaintiff's suspension. Although the City Defendants contend that Plaintiff, notwithstanding his suspension was still a sworn law enforcement officer and employee of the NYPD, the fact that Plaintiff was suspended and, for the substantial majority of the time period relevant to the prior restraint claim, was hundreds of miles outside the NYPD's jurisdiction provides a sufficient factual basis for Plaintiff to allege that he sought to exercise his First Amendment rights "as a citizen," rather than "as a government employee."

However, the proposed SAC includes an allegation that "NYPD defendants illegally seized plaintiff's draft report to Commissioner Raymond Kelly detailing the police corruption and misconduct he had been documenting and

collecting in an effort to prevent said material from being disclosed to anyone." SAC ¶ 260. As was noted in this Court's opinion dated June 14, 2012, the NYPD Patrol Guide § 207-21 states that "[a]ll members of the service have an absolute duty to report any corruption or other misconduct, or allegation of corruption or other misconduct, of which they become aware." See Schoolcraft, 2012 WL 2161596, at *6. Additionally, as was noted in the June 14 opinion, in the case of Matthews v. City of New York, No. 12 Civ. 1354(BSJ), 2012 U.S. Dist. LEXIS 53213 (S.D.N.Y. Apr. 12, 2012), the Honorable Barbara S. Jones addressed an issue similar to that presented here involving a police officer who claimed retaliation for complaining about an illegal traffic summons quota system. Judge Jones held that Police Officer Matthews, in complaining about the quota policy, did not speak as a private citizen. See Matthews, 2012 U.S. Dist. LEXIS 53213, at *7-8 ("Matthews' complaints to his supervisors are consistent with his core duties as a police officer, to legally and ethically search, arrest, issue summonses, and – in general – police."). Accordingly, Plaintiff may not make a prior restraint claim based on the seizure of his report to Commissioner Kelly because the contents of that report, which was prepared as part of Plaintiff's official duties, are not protected by the

First Amendment. However, unlike Plaintiff's written report to the Commissioner documenting corruption, Plaintiff's alleged intent to speak out to the media and public at large concerning the NYPD's summons policy while on suspension represents speech that is not pursuant to Plaintiff's official duties and, as such, is protected by the First Amendment.

With respect to the merits of Plaintiff's prior restraint claim, as noted above, Plaintiff's proposed SAC includes allegations that, between December 2009 and the present, NYPD officials visited Plaintiff's residence 350 miles from New York City more than a dozen times, wore firearms, pounded and kicked on Plaintiff's door, shouted at Plaintiff and spied on Plaintiff through his bedroom window. See SAC ¶¶ 208-11. The SAC also alleges that "armed NYPD officials continue, up and through the present, to come to his home, repeatedly pound on his door, photograph him, and engage in efforts designed to purposefully intimidate and harass plaintiff in a tireless effort to silence him once and for all." SAC ¶ 213. The proposed SAC suggests Plaintiff, absent Defendants' harassment, would have spoken out to the media and the public at large concerning the NYPD's summons policy:

> [F]ollowing plaintiff's suspension on October 31, 2009 the NYPD defendants unconstitutionally imposed this prior restraint on plaintiff's speech in an effort by defendants to silence, intimidate, threaten and prevent plaintiff from disclosing the evidence of corruption and misconduct plaintiff had been collecting and documenting to the media and the public at large. SAC ¶ 259.
>
> Moreover the actions taken by NYPD defendants following plaintiff's suspension on October 31, 2009 in continuing to involuntarily confine him at JHMC [Jamaica Hospital] and relentlessly harassing, threatening and intimidating him at his new home in upstate New York violated plaintiff's First Amendment right as he was continuing to attempt to disclose information to the public at large that the largest Police Department in the United States had committed serious and continuous breaches of the public trust. SAC ¶ 269.

The City Defendants contend that these allegations in the SAC constitute a blend of factual allegations and conclusory statements of intent that are insufficient to establish a reasonable inference that Defendants were making an effort at prior restraint. As such, the key question in determining whether Plaintiff has pled a valid cause of action for prior restraint depends on whether the proposed SAC alleges sufficient facts to establish that Defendants' motivation in their campaign of harassment was to prevent Plaintiff from speaking out to the media and public at large concerning the NYPD's summons policy.

In support of his motion to amend, Plaintiff cites four prior restraint cases: Zieper v. Metzinger, 392 F. Supp. 2d 516 (S.D.N.Y. 2005); Penthouse v. McAuliffe, 610 F.2d 1353 (5th Cir. 1980); ACLU v. City of Pittsburgh, 586 F. Supp. 417 (W.D. Pa. 1984); and Grennan v. Nassau County, No. 04-2158(DRH)(WDW), 2007 WL 952067 (E.D.N.Y. Mar. 29, 2007). In all four of these cases, the government officials accused of engaging in prior restraint of the plaintiffs' First Amendment rights explicitly expressed their intent to limit the plaintiffs' speech. See Zieper, 392 F. Supp. 2d at 521-23 (describing phone calls an FBI agent and assistant US attorney made to defendants discussing the blocking of content on a website); Penthouse, 610 F.2d at 1360 (describing a "scheme that included public announcements in the local newspapers, systematic visits to retailers of the magazines in question, and a program of carefully timed warrantless arrests" that created a constructive seizure of the plaintiff's publications); ACLU, 586 F. Supp. at 419 (describing a statement from the Mayor released to local media organizations addressed to all magazine and news dealers expressing his distaste for the contents of a pornographic magazine and requesting businesses to remove it from their shelves, thereby eliminating "the need for the City to engage in a massive

sweep of all news stands and stores and the initiation of criminal proceedings"); Grennan, 2007 WL 952067, at *11 (describing plaintiff's supervisor's request that plaintiff "not be in contact with anyone during the day unless there is an emergency of some kind" and that there was "no need for [plaintiff] to be talking to other staff members"). Unlike these four cases, the proposed SAC does not allege facts where Defendants expressly state their intent to prevent Plaintiff from speaking out. While the proposed SAC does allege that Defendants acted "to purposefully intimidate and harass plaintiff in a tireless effort to silence him once and for all," SAC ¶ 213, this statement is not a factual allegation, but rather a conclusory statement concerning Defendants' intent. As such, the facts alleged in the proposed SAC do not establish Defendants' intent to restrain Plaintiff's speech in as clear a manner.

However, the proposed SAC does allege facts from which Defendants' intent to restraint Plaintiff's speech can be inferred. Although the cases involved First Amendment claims in a retaliation rather than prior restraint context, courts have found that intent can be inferred when a complaint pleads sufficient factual allegations to allow such an

inference. See Dougherty, 282 F.3d at 91 ("The ultimate question of retaliation involves a defendant's motive and intent, both difficult to plead with specificity in a complaint. It is sufficient to allege facts from which a retaliatory intent on the part of the defendants reasonably may be inferred."); Dorsett-Felicelli, Inc. v. County of Clinton, 371 F. Supp. 2d 183, 191 (N.D.N.Y. 2005) ("The chronology of events as presented by Plaintiff is sufficient to infer the County Defendants had a retaliatory motive.").

Here, the proposed SAC alleges that Plaintiff's refusal to comply with the NYPD's summons policy resulted in increased pressure and scrutiny from his supervisors, that he received a poor evaluation based on his low summons activity and that when he challenged his low work evaluation, Plaintiff was subjected to intensified scrutiny and pressure to drop his objections. The proposed SAC includes allegations that Plaintiff was subjected to threats, intimidation and harassment because of his refusal to drop his appeal of his low performance evaluation. The proposed SAC further alleges that when Plaintiff raised his appeal to the NYPD summons policy to a Deputy Inspector in the department, he was harassed and intimidated by his superiors and reassigned to

the telephone switchboard to isolate and degrade Plaintiff. According to the proposed SAC, after Plaintiff reported the quota policy to internal affairs and the Quality Assurance Division, Defendants menaced Plaintiff, ultimately entering his home on October 31, seizing him and confining him to Jamaica Hospital, where he was held for six days. As noted above, Defendants' harassment of Plaintiff allegedly continued when Plaintiff relocated to a new home in upstate New York. These allegations, which are accepted as true at this stage of the litigation, provide sufficient facts upon which Defendants' intent to restrain Plaintiff's speech can be inferred.

The proposed SAC alleges facts that Plaintiff intended to speak, following his suspension from the NYPD, to the media and public at large about the NYPD's summons policy. This intended speech addressed a matter of public concern, and, because Plaintiff intended to speak to the media and public following his suspension, Plaintiff's speech was outside the scope of his official duties. Accordingly, the speech was protected by the First Amendment. The proposed SAC further alleges that Defendants seized Plaintiff from his home following his suspension, held him at Jamaica Hospital and

continued to harass him at his new home in upstate New York, thereby presenting sufficient facts upon which Defendants' intent to restrain Plaintiff's speech can be inferred. Accordingly, Plaintiff's motion to amend to include a prior restraint First Amendment claim is granted.

B. Plaintiff's Motion To Amend Is Denied With Respect To Allegations That Retaliatory Actions Were Taken Following Plaintiff's Refusal To Obey His Supervisors' Directives

In addition to requesting permission to amend the complaint to add a claim for prior restraint, Plaintiff requests that he be allowed to amend his complaint to include a claim of retaliation in violation of his First Amendment rights. As noted above, the theory behind this claim is that Plaintiff, by refusing to issue summonses and make arrests in the absence of probable cause, was exercising his First Amendment rights. According to the proposed SAC, Defendants' retaliated against Plaintiff for his exercise of his rights when Defendants unlawfully seized Plaintiff and detained him in the Jamaica Hospital psychiatric ward. See SAC ¶¶ 255-56.

According to Plaintiff, under Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011), Plaintiff's speech in refusing to

comply with the allegedly unconstitutional directive of his supervisors would afford him protection under the First Amendment. Plaintiff contends that the allegations in the proposed SAC illustrate the orders that Plaintiff refused to follow were linked to unconstitutional activity, that Plaintiff's speech in refusing to comply with these unconstitutional and illegal directives was protected under Jackler, and that anything done in retaliation of those refusals would be actionable under the First Amendment.

The facts of Jackler involved a probationary police officer who asserted First Amendment claims against a police chief and police officers, alleging retaliation for his refusals to make false statements in an investigation into a civilian complaint charging excessive use of force by a police officer. The Second Circuit, in holding that the probationary police officer's refusal to retract his truthful report and make false statements constituted action protected by the First Amendment, held that

> the First Amendment protects the rights of a citizen to refuse to retract a report to the police that he believes is true, to refuse to make a statement that he believes is false, and to refuse to engage in unlawful conduct by filing a false report with the police. We conclude that

> Jackler's refusal to comply with orders to retract his truthful Report and file one that was false has a clear civilian analogue and that Jackler was not simply doing his job in refusing to obey those orders from the department's top administrative officers and chief of police.

Jackler, 658 F.3d at 241-42.

Although Plaintiff's refusal to comply with his supervisors' directives appears to be analogous to Jackler's refusal to withdraw his truthful report and testify falsely, there is a key distinction between these two cases. In Jackler, the activity at issue concerned speech of a written and spoken variety, see Jackler, 658 F.3d at 234 ("On this appeal, the parties agree that Jackler's First Amendment claims are not that defendants retaliated against him for filing his Report but rather that they retaliated because of his refusals to follow their ensuing instructions to retract the Report and to speak falsely."), and Jackler's "First Amendment interest in refusing to make a report that was dishonest." Id. at 240. Ultimately, the Jackler Court concluded that "a citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject government efforts to require him to make

statements he believes are false." Id. at 241. In contrast to Jackler where the Second Circuit focused on a citizens' right "to decide what to say and what not to say," Plaintiff's activity does not involve speech but rather conduct, and, accordingly, Plaintiff's First Amendment interest is less clearly defined.

The boundary beyond which conduct becomes speech represents a difficult legal question, though the Second Circuit has provided guidance:

> For purposes of the First Amendment, the Supreme Court has repeatedly rejected the view that "an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). [The Second Circuit] echoed this view in East Hartford Educ. Ass'n v. Bd. of Educ. of the Town of East Hartford, 562 F.2d 838 (2d Cir. 1977), where [it] recognized that acknowledging the symbolic speech-like qualities of a course of conduct is "only the beginning, and not the end, of constitutional inquiry." 562 F.2d at 857.
>
> To determine whether conduct is expressive and entitled to constitutional protection requires an inquiry into whether the activity is "sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth Amendments," Johnson v. Texas, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), for not all conduct may be viewed as speech simply because by her conduct the actor intends to express an idea. See Spence v. Washington, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). To be sufficiently

> imbued with communicative elements, an activity need not necessarily embody "a narrow, succinctly articulable message," Hurley v. Irish American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 569, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995), but the reviewing court must find, at the very least, an intent to convey a "particularized message" along with a great likelihood that the message will be understood by those viewing it. Johnson, 491 U.S. at 404, 109 S.Ct. 2533; Spence, 418 U.S. at 410-11, 94 S.Ct. 2727.

Zalewsky v. County of Sullivan, 316 F.3d 314, 319 (2d Cir. 2003).

Irrespective of whether Plaintiff's speech presents a "particularized message," Plaintiff's action of not making an arrest or not issuing a summons is not entitled to First Amendment protection because there is no great likelihood that Plaintiff's message will be understood by those viewing it. "[T]o determine whether an act or activity is imbued with enough elements of communication to fall within the scope of the First Amendment, a court must assess not only the intention of the would-be speaker but also the objective likelihood that the putative message will be understood by those who view the activity." Fighting Finest, Inc. v. Bratton, 898 F. Supp. 192, 195 (S.D.N.Y. 1995) (citing Johnson, 491 U.S. at 404). In this case, it is a stretch to

say a person observing Plaintiff's refusal to make an arrest or issue a summons would understand Plaintiff's conduct as an expression of his disagreement with the NYPD's summons policy. Because Plaintiff's failure to make arrests or issue summonses is not protected by the First Amendment, Plaintiff's motion to amend the complaint to include a First Amendment retaliation claim is denied.

Conclusion

For the reasons set forth above, Plaintiff's motion to amend is granted with respect to the First Amendment prior restraint claim and denied with respect to the First Amendment retaliation claim.

It is so ordered.

New York, NY
September 7, 2012

ROBERT W. SWEET
U.S.D.J.